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No. 90-1794

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PEDRO J. CHARRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner knowingly and intelligently waived his Sixth Amendment right to counsel.

2. Whether the Fifth Amendment privilege against compelled self-incrimination permits an individual to destroy evidence.

3. Whether destruction of evidence by a defendant before he has knowledge of the existence of a criminal investigation, coupled with false statements to investigating officers, may be considered an "obstruction of justice" under Sentencing Guidelines § 3C1.1.

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OPINION BELOW

The court of appeals' opinion (Pet. App. A2-A18) is reported at 919 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1990. A petition for rehearing was denied on February 5, 1991. Pet. App. A1. The petition for a writ of certiorari was filed on May 21,

1991, and therefore is out of time pursuant to Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the Southern District of New York, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), and money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 1956(a)(2). He was sentenced to 25 years' imprisonment for the conspiracy offense under the Sentencing Guidelines, to be followed by five years' supervised release, and to a concurrent non-Guideline sentence of ten years' imprisonment for the money laundering offense. Pet. App. A7. The court of appeals affirmed. Pet. App. A2-A18.

1. Petitioner was the New York accountant for a member of a Colombian drug cartel. Petitioner conspired to distribute cocaine and conducted a transaction designed to conceal and disguise illegal narcotics proceeds. Pet. App. A4.

On October 9, 1988, shortly after petitioner had been indicted, United States Customs Service agents came to his home in Dix Hills, Long Island, with an arrest warrant. After knocking on petitioner's door and ringing his doorbell, the agents were let inside the home by petitioner's wife. Several of the agents, with guns drawn, entered petitioner's bedroom, where they found him in his underwear. The agents told him that he was under arrest and asked if he had any weapons. Petitioner responded that he did not. Petitioner was taken to the kitchen, where he was again told that he was under arrest. He was shown a copy of the arrest warrant, which indicated that he was under indictment for conspiracy to distribute

cocaine and money laundering. Two agents testified that, in addition to showing petitioner a copy of the arrest warrant, one of the agents explained to petitioner that he was under indictment. Pet. App. A4.

After viewing the arrest warrant, petitioner began to reply, "I didn't do anything," but was interrupted by an agent who orally administered *Miranda* warnings in English and Spanish. At this juncture, no weapons were drawn and petitioner was not handcuffed. Petitioner then signed an advice-of-rights form printed in English and Spanish that waived his right to remain silent. He then told the agents that "he didn't know anything about any of those things, and [that] he was in the glass etching business." Pet. App. A5.

Thereafter, the agents asked for and received petitioner's oral and written consent to search his house. He admitted having a gun and directed the agents to a file cabinet in the basement where they found a weapon. The agents also discovered an envelope under petitioner's desk containing extensive drug records. When asked about the records, petitioner responded, "That's what's going to get me in trouble." After a further search, the agents found address books, receipt books, a beeper, and a cellular telephone in the basement. Pet. App. A5.

The agents then went outside with petitioner and noticed a pile of ashes in the driveway. Underneath the ashes, still in readable condition, were other drug records matching those found in the envelope in the basement. Petitioner told the agents that he had burned those materials the night before when he was outside and wanted to keep warm. Similar records were found in a nearby garbage can. To explain the existence of all the records, petitioner told the agents

that while he was on vacation in Colombia, two unknown men asked him if he would store some financial records for someone in New York until that person contacted him and arranged to pick up the records. Pet. App. A5-A6.

2. Before trial, the district court denied petitioner's motions to suppress his statements and the physical evidence seized from his residence at the time of his arrest. The court rejected petitioner's Fourth, Fifth, and Sixth Amendment challenges to the admission of this evidence. At sentencing, the district court enhanced the base offense level under the Sentencing Guidelines by two offense levels under Sentencing Guidelines § 3C1.1 for obstructing justice by burning the drug records, denying in his initial questioning that he had a weapon, and lying about both his acquisition of the documents and his reasons for destroying them. Pet. App. A7-A8.[1]

3. The court of appeals affirmed petitioner's convictions and sentence. The court rejected petitioner's claim, made for the first time before the court of appeals (see Pet. App. A7), that his waiver of his Sixth Amendment right to counsel on the indicted offenses was invalid because he was not informed

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[1] Petitioner's drug conspiracy offense had a base offense level of 36 under Sentencing Guidelines § 2D1.1(a)(3), which was enhanced two offense levels for possession of the firearm under Sentencing Guidelines § 2D1.1(b)(1) as well as two offense levels for the obstruction of justice. Petitioner was denied a two level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1. Petitioner's sentencing range for an offense level of 40 and a criminal history category of I was 292-365 months, within which the district court imposed a sentence of 300 months. Pet. App. A7-A8.

that he was under indictment.[2] Pet. App. A8-A15. Although there was substantial evidence that petitioner had in fact been told that he was under indictment when he waived his right to counsel, the court of appeals assumed for purposes of the appeal that petitioner was not aware that he was under indictment at the time he executed the waiver form. Pet. App. A4, A8 & n.1.

Following the analysis of *Patterson* v. *Illinois*, 487 U.S. 285, 292-297 (1988), the court held that "the sixth amendment right to counsel can be knowingly and voluntarily waived by a criminal defendant who has been made fully aware of the nature of the right being abandoned and the consequences of the abandonment." Pet. App. A9. Because, in the court's view, the *Miranda* warnings petitioner received fully apprised him of the nature of his right to counsel and the consequences of its abandonment, petitioner's waiver of that right under the Sixth Amendment was effective. Pet. App. A14-A15.

The court of appeals also rejected petitioner's argument that the district court improperly adjusted his base offense level under Sentencing Guidelines § 3C1.1 for obstructing justice. Pet. App. A18. The court held that the district court's factual determinations were not clearly erroneous and that the fact that petitioner quickly recanted his false statement regarding the gun did not render the adjustment invalid. Pet. App. A17-A18.

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[2] Petitioner alleged merely that his waiver was uninformed; he did not challenge on appeal the district court's finding that the waiver was "voluntary and intelligent." Pet. App. A6.

ARGUMENT

1. Petitioner contends (Pet. 11-14) that a waiver of the right to counsel executed by a defendant who does not know that he is under indictment is ineffective.

Initially, this case is not an appropriate vehicle for this Court to address the question petitioner seeks to present. Petitioner did not claim in the district court that he was unaware of his indictment at the time he waived his right to counsel. Pet. App. A4. There is therefore no factual predicate for the claim petitioner seeks to raise.[3]

In any event, petitioner's legal claim is without merit. In *Patterson* v. *Illinois*, 487 U.S. 285, 292-297 (1988), this Court held that *Miranda* warnings, although intended to protect a defendant's Fifth Amendment rights, could suffice to make a defendant aware of the nature of his Sixth Amendment right to counsel and the consequences of waiving that right. In such circumstances, the Court held, a waiver of the right to counsel in response to *Miranda* warnings could be a knowing and intelligent waiver of the Sixth Amendment right to counsel. *Ibid.*

While *Patterson* did not expressly decide whether an accused must be told that he is under indictment in order for his waiver to be effective, see 487 U.S. at 295-296 n.8, the analysis of *Patterson* compels the conclusion that, under the specific circumstances of this case, petitioner's claim has no merit. *Patterson*'s holding is based on the proposition that a waiver executed by an accused who understands the nature

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[3] The material that is in the record suggests that petitioner was informed that he was under indictment when he waived his right to counsel. See Pet. App. A4, A8 n.1.

of the right to counsel and the consequences of a waiver of that right is a knowing and intelligent waiver. Petitioner was adequately informed by the *Miranda* warnings that he had a right to have counsel present before being questioned and that his waiver of that right might result in his statements being used against him at trial. Moreover, the fact that he was being arrested and the presence of a number of armed agents on the scene put petitioner on notice of the seriousness of his situation. Like the defendant in *Patterson*, petitioner cannot identify any meaningful additional information that would have been required to make his waiver knowing and intelligent.

2. Petitioner also asserts (Pet. 14-18) that his Fifth Amendment right against compulsory self-incrimination precludes adjustment of his base offense level for obstruction of justice behavior. That assertion is mistaken.

First, petitioner's claim is not properly before this Court. Although in the court of appeals petitioner challenged the application of Sentencing Guidelines § 3C1.1 to enhance his sentence, petitioner did not raise before that court his current claim that his Fifth Amendment privilege against compulsory self-incrimination precluded adjustment of his offense level under Section 3C1.1. See Pet. App. A18; Pet. C.A. Br. 20-23.

In any event, petitioner's claim that he had a constitutional right to destroy records detailing drug transactions is frivolous. None of the cases cited by petitioner (Pet. 15) provides support for that claim. *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), involved convictions for failing to register for and pay excise

taxes on wagering, where registration for and payment of the tax would have required the defendants to submit forms to the government admitting that they had violated gambling laws. Although *Fisher* v. *United States*, 425 U.S. 391 (1976), held that in some circumstances an individual may not be compelled to comply with a subpoena duces tecum requiring production of personal records in his possession, the fact that an individual cannot be compelled to produce such records does not suggest that he has a constitutional privilege to destroy them. Cf. *Andresen* v. *Maryland*, 427 U.S. 463 (1976) (individual may not assert Fifth Amendment right against compulsory self-incrimination to preclude seizure of business records from his offices). In short, although the Fifth Amendment protects individuals from being compelled to provide incriminating evidence against themselves, it has never been interpreted to make destruction of evidence a privileged act.

3. Petitioner claims (Pet. 17 & n.7) that his destruction of evidence before he knew that he was under investigation and his false statements to police officers were improperly used to enhance his sentence under Sentencing Guidelines § 3C1.1.

a. First, petitioner's claim that his destruction of documents was improperly used to enhance his sentence is not properly before the Court. Petitioner did not assert below that he was unaware that he was under investigation at the time he destroyed the records, see Pet. C.A. Br. 20-23, and the court of appeals consequently did not pass upon his claim that his alleged lack of awareness precluded the application of Guidelines § 3C1.1. Therefore, he may not now assert that his lack of awareness of a pending investigation precluded an upward adjustment under Guidelines § 3C1.1.

Second, petitioner's burning of some records and discarding of others, coupled with his improbable explanation that he set the fire to keep warm, provided sufficient evidence to support an inference that petitioner was aware that there was an ongoing investigation at the time he destroyed the records. Therefore, the district court's application of Guidelines § 3C1.1, even under petitioner's theory, was correct.

Third, insofar as any issue concerning the interpretation of the Guidelines is raised by petitioner's claim concerning destruction of documents, it has no continuing significance. As petitioner points out (Pet. 17 n.7), the revised Commentary to Section 3C1.1, effective November 1, 1990, makes clear that destruction of evidence may be used to enhance a sentence under Section 3C1.1 only if the act was committed or attempted "upon learning that an official investigation has commenced or is about to commence."

b. Insofar as petitioner's objection to his upward adjustment is based on his claim that the district court ought not have taken into account his false statements to Customs agents, his objection is also meritless. As the court of appeals recognized, "a sentencing judge may weigh evidence of even a quickly recanted lie." Pet. App. A18. That is particularly true where, as here, petitioner in addition made other false statements that were not recanted and destroyed relevant documentary evidence. See *ibid.*

The court of appeals' conclusion that the district court properly applied the Guidelines in this case does not conflict with *United States* v. *Fiala*, 929 F.2d 285 (7th Cir. 1991). In *Fiala*, the defendant was driving a car when he was stopped by a state trooper who inquired whether the defendant had any-

thing illegal in the car. The defendant responded that he did not. *Id.* at 286. The Seventh Circuit held that the defendant's sentence could not be enhanced under Guidelines § 3C1.1 for his simple denial of guilt. *Id.* at 289-290.

Even if correct, the decision of the Seventh Circuit in *Fiala* does not support petitioner's claim. Unlike the statements in *Fiala*, petitioner's statements were not simple exculpatory denials. Petitioner lied to Customs agents concerning one potentially crucial fact—the existence of a weapon on the scene—that was unrelated to his guilt or innocence of the charges under investigation. In addition, he told an elaborate, if improbable, story concerning his destruction of documents that also went well beyond a simple denial that he was guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

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